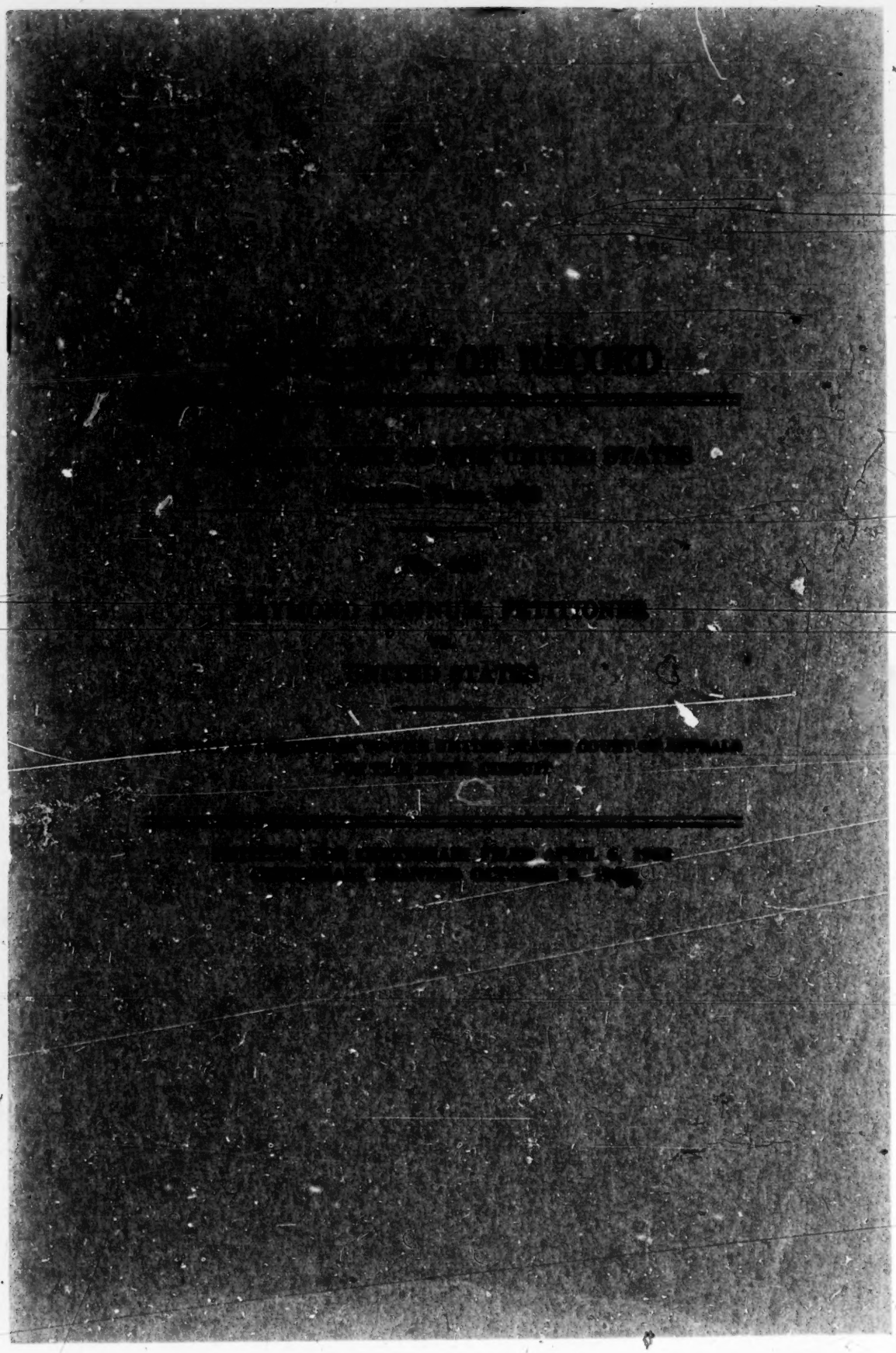

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 489

RAYMOND DOWNUM, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

2 In United States District Court, Western District
Of Texas, San Antonio Division

Criminal No. 22115

Vio. 18 USC 1708, 495 and 371

UNITED STATES OF AMERICA

vs.

JUAN R. CAMPOS, RAYMOND DOWNUM, RONNIE HECK, AND RAYMOND HECK

Indictment

Filed April 17, 1961

THE GRAND JURY CHARGES:

That on or about December 3, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Juan R. Campos, Ronnie Heck, and Raymond Heck; acting jointly and severally, knowingly and unlawfully stole from a house letter box, a letter addressed to Dolores M. Cameron, 648 West Elmira Street, San Antonio 12, Texas, and the said Juan R. Campos, Ronnie Heck, and Raymond Heck removed from such letter an article, to-wit, Check No. 15,676,363, drawn on the Treasurer of the United States in the sum of $56.30, which said check is fully described in the Second Count hereof.

COUNT TWO

That on or about the time and place and within the jurisdiction, all as set out in the First Count hereof, Ronnie Heck, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Dolores M. Cameron, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $56.30, which said check is described as follows:

> Check No. 15,676,363 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Dolores M. Cameron, in the sum of $56.30.

COUNT THREE

That on or about the time and place and within the jurisdiction, all as set out in the First Count hereof, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck, acting jointly and severally, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the Second Count hereof, then knowing the endorsement thereon to be forged.

3 COUNT FOUR

That on or about December 6, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Raymond Downum, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Jayme J. Maltsberger, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $58.00, which said check is described as follows:

Check No. 15,443,535 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Jayme J. Maltsberger, in the sum of $58.00.

COUNT FIVE

That on or about the time and place and within the jurisdiction, all as set out in the Fourth Count hereof, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck, acting jointly and severally, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the Fourth Count hereof, then knowing the endorsement thereon to be forged.

COUNT SIX

That on or about December 1, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Raymond Downum, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Clarence D. Rutledge, upon the back of

a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $19.00, which said check is described as follows:

> Check No. 1,624,541 drawn on the Treasurer of the United States, dated November 30, 1960, issued at Dallas, Texas, over Symbol No. 3110, payable to the order of Clarence D. Rutledge, in the sum of $19.00.

COUNT SEVEN

That on or about the time and place and within the jurisdiction, all as set out in the Sixth Count hereof, Raymond Downum, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the Sixth Count hereof, then knowing the endorsement thereon to be forged.

4 COUNT EIGHT

That on or about November 4, 1960, and continuing to and through December 28, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck, acting jointly and severally, did unlawfully, knowingly and wilfully combine, conspire, confederate and agree to commit offenses against the United States of America, the exact date of the formation of the conspiracy and its termination being to the Grand Jury unknown, to-wit, to knowingly and unlawfully steal from a house letter box a letter and to remove from such letter a check drawn on the Treasurer of the United States; to knowingly and fraudulently make and forge the name of the payee upon the back of a U.S. Treasury Check for the purpose of obtaining and receiving from the United States a certain sum of money; and to knowingly and wilfully utter as true the check described knowing the endorsement thereon to be forged, and pursuant to said conspiracy, and to effect the objects thereof, the following overt acts were committed:

1. On or about November 4, 1960, Raymond Downum, Raymond Heck, Ronnie Heck, and Juan R. Campos met in a tavern on South Presa Street in San Antonio, Texas.

2. On or about December 1, 1960, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck had another meeting.

3. On or about December 1, 1960, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck agreed to split up into two teams, one team being comprised of Raymond Downum and Juan R. Campos, and the other team composed of Raymond Heck and Ronnie Heck.

4. On or about December 1, 1960, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck walked up and down numerous streets in San Antonio looking in mail boxes for Government Checks.

5. On or about December 3, 1960, Raymond Downum furnished his automobile, a 1951 Plymouth, License Number JR-4013, to Raymond Heck, Ronnie Heck, and Juan R. Campos.

6. On or about December 3, 1960, Juan R. Campos, Ronnie Heck, and Raymond Heck drove in Raymond Downum's automobile to the vicinity of Hoefgen Avenue, San Antonio, Texas.

7. The acts described in Counts One, Two, Three, Four, Five, Six and Seven of this Indictment.

A True Bill,

ROSCOE HARDING,
Foreman

RUSSELL B. HINE,
United States Attorney.

6 United States District Court, Western District of Texas, San Antonio Division

No. 22115

THE UNITED STATES OF AMERICA

vs.

JUAN R. CAMPOS (19), RAYMOND DOWNUM (21), RONNIE HECK (20) AND RAYMOND HECK (24)

Indictment

Vio. 18 USC 1708, 495 and 371.

Filed in open court this 17th day of April, 1961.

MAXEY HART, *Clerk.*

Warrant is hereby ordered for the arrest of the defendant, Raymond Heck. Bail is hereby fixed in the sum of $1,500.00 returnable instanter to the San Antonio Division of the Western District of Texas, to be taken by any United States Commissioner.

BEN H. RICE, Jr.,
United States District Judge.

9 In United States District Court, Western District of Texas, San Antonio Division

Criminal No. 22115

Vio. 18 USC 1708, 495, and 371

[Title omitted]

Plea of former jeopardy

Filed April 27, 1961

Now comes Raymon Downum, defendant in the above case, prior to the selection of the second jury in this case, and files this plea of former jeopardy and asks the court to sustain it and dismiss the charges against him and as grounds would show to the court as follows:

I.

On a Wednesday afternoon, April 19, 1961, defendant Downum was arraigned in open court on the indictment in this case together with defendants, Juan R. Campos and Ronnie Heck. Defendant Downum pled not-guilty as to all counts of the indictment against him, while the defendants, Juan R. Campos and Ronnie Heck pled guilty to all counts of the indictment at that time.

II.

On Tuesday, April 25, 1961, at approximately 10 o'clock, the Court called the case of *United States of America* vs. *Downum*, this cause, for selection of the jury and both sides announced ready, and thereupon the jury was selected, which jury was designated by the Court as Jury No. 4 and instructed to report at 2 o'clock in the afternoon of Tuesday, April 25, 1961. Prior to jury's leaving the box on the morning of April 25, the jury was duly sworn and instructed not to discuss any of the facts of the case of United States of America vs. Raymond Downum.

III.

At 2 o'clock on Tuesday, April 25, 1961, the jury still being in the hall and not in the courtroom, the court announced from the bench that the prosecutor had conferred with him in his office and had advised that the Government was not ready because of the absence of a material witness and the court stated that he was going to discharge the jury until some later time.

IV.

Defendant through his attorney of record objected and inquired of the prosecutor who the missing witness was, and the prosecutor stated it was Clarence D. Rutledge, named payee in the check involved in count 6 and 7 of the indictment against Raymond Downum. Thereupon the defendant moved that the court allow this jury that had been selected to try the other four counts upon which Mr. Rutledge was not involved, to wit, counts 3, 4, 5 and 8. The court overruled this motion; thereupon counsel for the defendant moved to dismiss counts 6 and

7 for want of prosecution. The court overruled this motion. Thereupon the court proceeded to discharge the jury.

V.

At 2 o'clock on Thursday, April 27, 1961, defendant was called to pick another jury and prior to picking this jury, which will be a different jury from a different panel than the panel from which the first jury was selected, defendant says to the court that he has been placed in jeopardy once the first jury was sworn in and that the charges against him should now be dismissed, since to try him at this time would be to place in double jeopardy against the fifth amendment to the Constitution of the United States of America.

VI.

Defendant would show to the court that there has been no motion for continuance filed at this time setting out what diligence or exercise by the prosecutor for the government in obtaining Clarence D. Rutledge or any reason why they could not have ascertained the subpoena had not been served on Clarence D. Rutledge prior to picking the first jury in this case. This defendant says that this was not a "unforeseeable circumstance" which arose during the course of the trial nor an urgent circumstance. Furthermore, there was no showing by the District Attorney that even though Clarence Rutledge had not been served with subpoena by the U.S. Marshall's Office, that he was not on his way to the trial and would pick up his
11 subpoena in the Marshall's office in San Antonio when he arrived, and no showing that he would not be able to arrive before this trial was concluded.

VII.

This defendant says the District Attorney took a chance by allowing the first jury to be impaneled and sworn without having ascertained whether or not his witnesses were present. There was no continuance asked for by the Government to enable them to check and see if their witnesses were all present, and in fact, the U.S. Marshall's Office is directly across

the hall from the U.S. Attorney's Office and just down the corridor from the District Court.

VIII.

This is a situation where the District Attorney simply entered upon a trial of the case without sufficient evidence to convict as to counts 6 and 7, and for some reason of his own, was unwilling to go ahead on the balance of the counts and requested another jury not only as to counts 6 and 7 but as to all counts.

IX.

Defendant specifically calls the attention of the Court to the case of *Cornero* vs. *United States* 48 5th 2d 69 (9th Cir. 1931) where the facts are identical to the case at bar with the exception that in that case, the missing witnesses had not been subpoenaed but had been released under bond to appear for sentence on the day of the trial.

X.

Defendant also wishes to call the court's attention to the language of Justice Black in the case of *Green* vs. *United States* 355 U.S. 184 at middle of page 188.

XI.

Defendant says that if this case is allowed to stand that a principle of law will be established and will allow a prosecutor on a multi-count indictment to subject a defendant to a
12 second prosecution by discontinuing the trial when it appears that the first jury selected might not convict by simply stating that he is not ready to go to trial on one count of the indictment and asks a new jury for all counts, and his only excuse need be that prior to picking the first jury he had not checked all of his witnesses, and after picking the jury he had checked, found that a witness as to one count was absent and not been served with subpoena. This is not the type of "unforeseeable circumstances" arising during the first trial of a case which constitutes an exception to the rule of double jeopardy.

Wherefore, premises considered, defendant, Raymond Downum, asks the trial court to dismiss the case and discharge him.

GROCE & HEBDON,
By RICHARD TINSMAN,
Attorneys for defendant.
911 Frost Bank Building, San Antonio, Texas.

16 In United States District Court, Western District of Texas, San Antonio Division

Number 22115 Criminal

UNITED STATES OF AMERICA

vs.

RAYMOND DOWNUM, ET AL

Transcript of proceedings and of the evidence of April 25, 1961.

17 TUESDAY, APRIL 25, 1961

MORNING SESSION

(A jury was duly empaneled and sworn.)

The COURT. Ladies and gentlemen, you are members of Jury Number 4, and during the trial of this case you will be permitted to separate, but you must not discuss the facts of this case among yourselves until after the Court has charged you. You must not discuss the facts with anyone during the trial or permit anyone to discuss the facts within your hearing. You will have no conversation about any matter whatsoever—I mean that literally—with any attorney in the case either for the Government or the defendant, or with the defendant or any witness in the case.

It will be necessary for me to put you to the inconvenience of coming back at 2:00 o'clock this afternoon.

Those of you who were summoned for jury service and who were not on the first jury selected this morning, which is Jury Number 3, or the jury in the box, will be excused until tomorrow morning at 9:00 o'clock. I suggest each of you give the Marshal your phone number so that if the case is pro-

18 longed you will be notified this afternoon, in order to save you a useless trip. So you will be excused now.

TUESDAY, APRIL 25, 1961
AFTERNOON SESSION

Colloquy between Court and counsel

The COURT. Mr. Tinsman, in your case the Government's key witness is not here. They announced ready and didn't have the witness when they announced. So I am going to discharge this jury from this case, and pass it.

Mr. TINSMAN. Is it permissible to tell me who the Government's key witness is that's missing?

Mr. MCDONALD. Mr. Rutledge, one of the named payees in the indictment. It is Counts 6 and 7 of the indictment.

Mr. TINSMAN. Well, are you unable to find him?

Mr. MCDONALD. We have been unable to have the subpoena served at the present time.

Mr. TINSMAN. Your Honor, I feel this way. In view of the fact this is only as to two counts of the indictment, and there are still, as to Raymond Downum, four other counts, and in view of the fact the Government announced ready and we picked the jury, that we should go forward at this time on the counts that I assume they are ready on—the other counts.

The COURT. Do you want to have two trials?

19 Mr. TINSMAN. At this time, Your Honor, I think I am in the position that I would just as soon have two trials. I picked a jury and I think it's a satisfactory jury.

The COURT. I am not willing to have two trials. It will take too much time of the Court. The Government shouldn't have picked a jury when they weren't ready. Unfortunately, they didn't check up on the witnesses.

Motion to dismiss Counts 6 and 7 and denial thereof

Mr. TINSMAN. Let me make a motion at this time to dismiss Counts 6 and 7 for want of prosecution.

The COURT. Those are the two counts?

Mr. TINSMAN. Yes, sir.

The COURT. I will overrule the motion because they expect to give you a trial later this week or next week.

Mr. TINSMAN. All right, sir.

The COURT. So when the jury comes in I will just discharge them from this case and may use them in another case. Is your defendant on bond?

Mr. TINSMAN. No. The defendant is in the county jail.

The COURT. Take charge of him, Mr. Marshal.

(Which were all the proceedings had on the 25th day of April, 1961, in cause styled United States vs. Raymond Downum, Criminal Number 22155, in the San Antonio Division of said court.)

20 In United States District Court, Western District of Texas, San Antonio Division

Number 22115 Criminal

UNITED STATES OF AMERICA

vs.

RAYMOND DOWNUM, ET AL.

Transcript of proceedings and of the evidence of April 27, 1961

Be it remembered that on the 27th day of April, 1961, in the San Antonio Division of the United States District Court, Western District of Texas, before the Honorable Ben H. Rice, Jr., Judy of said Court, and a duly empaneled jury, there came on for trial the above styled and numbered cause, whereupon the following proceedings were had and the following evidence introduced:

Appearances: Mr. John W. McDonald, Assistant United States Attorney, Waco, Texas, appearing on behalf of the Government; Mr. Richard Earl Tinsman, Eskridge, Groce & Hebdon, San Antonio, Texas, appearing on behalf of the Defendants.

21 THURSDAY, APRIL 27, 1961

AFTERNOON SESSION

Colloquy between Court and counsel

Mr. MCDONALD. We'd like to call Number 22115, *United States* vs. *Raymond Downum*.

The COURT. Mr. Tinsman, are you ready?

Mr. TINSMAN. Before we proceed, I have a motion on the basis of former jeopardy, and I have a case on all fours.

The COURT. Let me see it.

Mr. TINSMAN. I just got here, Your Honor. It's 48 Fed. 2nd. If I can go into the library a moment——

The COURT. All right. Call the first 28 jurors.

(Thereupon a jury was duly empaneled and sworn.)

The COURT. Ladies and gentlemen, you are members of Jury Number One. During the trial of this case you will be permitted to separate. You must not discuss the facts of this case among yourselves until you receive the Court's charge at the end of the trial, and you must not discuss this case with anyone else at any time during the trial until after the verdict is rendered. You will have no conversation about any matter whatsoever with any attorney for the Government or the attorney for the defendant, or with the defendant or any witness in the case for either side. In other words, you are here to try this case from the evidence adduced from this witness stand and this witness stand alone. You will be excused until 9:00 o'clock tomorrow morning. Mr. Tinsman, you will be excused until tomorrow morning at 9:00 o'clock.

Mr. TINSMAN. When can I develop my bill, Your Honor?

The COURT. You can't develop it this afternoon anyway.

(Thereupon this case was recessed until 9:00 a.m., Friday, April 28, 1961.)

FRIDAY, APRIL 28, 1961
MORNING SESSION

The COURT. Mr. McDonald, are you gentlemen ready in the Downum case? Subject to your motion, you are ready?

Mr. TINSMAN. Subject to my motion, I am ready, and we invoke the rule.

The COURT. All right. Call your witnesses, please, gentlemen.

* * * * *

49 CLARENCE D. RUTLEDGE, a witness called by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. MCDONALD:

Q. Would you state your name, please?

A. Clarence D. Rutledge, sir.

Q. And what kind of work do you do?

A. I am a commercial photographer, sir.

Q. And how long have you been engaged in that work or occupation?

A. Oh, about ten years, sir.

Q. And expressly and specifically, what do you do as a commercial photographer?

A. I make large groups of Army installations, and high school senior classes of all the large high schools all over the State of Texas.

50 Q. Mr. Rutledge, where were you Sunday, and Monday, and Tuesday of this week?

A. I was in Big Spring, Texas, sir, Big Spring and Snyder.

Q. You go from town to town taking pictures of school groups; is that correct?

A. Yes, sir.

Q. All right, sir. Now, where do you live?

A. 447 Schley Avenue, sir.

Q. I hand you what has been marked for identification as Government's Exhibit Number 5, and ask you to look at that, and see if you can identify it?

A. Yes, sir. That's my compensation check that I receive each month from World War I.

Q. And are you the named payee on that check?

A. Yes, sir, Clarence D. Rutledge.

Q. Did you receive that particular check?

A. No, sir, I did not.

Q. Did you receive any of the proceeds from that check?

A. No, sir.

Q. Did you place any of the names that appear on the back of that check—did you place them there?

A. No, sir.

Q. Did you authorize anyone else to place your name on the back of that check?

A. I did not, sir.

Q. And did you authorize anyone else to cash your check?

51 A. I have never authorized anyone to cash my Government checks, sir.

Mr. McDONALD. Pass the witness, Your Honor.

Cross-examination by Mr. TINSMAN:

Q. Mr. Rutledge, are you married, sir?

A. Yes, sir.

Q. Did your wife know that you would be in town on Wednesday morning?

A. This Wednesday?

Q. Yes, sir.

A. No, sir, she did not.

Q. When did she expect you in, sir?

A. Well, she never expects me in until I notify her that I am coming in.

Q. Did she know where you were at all times?

A. She never knows where I am at all times.

Q. Did you call into her on Monday night or Tuesday night, or at any time Monday or Tuesday?

A. I did not.

Q. When is the first time that you came into San Antonio?

A. The first time?

Q. Yes, this week.

A. Yesterday morning.

52 Q. Thursday morning.

A. Thursday morning.

Q. Did you call in to your wife any time previous to that time as to when you'd be in town?

A. No sir. I wasn't expected to come in until the 25th of May.

Q. Had you been planning on making this trip?

A. Certainly not.

Q. In other words, you left on Monday unexpectedly?

A. I left where on Monday?

Q. In other words, you live in San Antonio, don't you?

A. That's right.

Q. What day did you leave San Antonio?

A. I will have to think. It has been more than a month ago. I left for Laredo about a month ago, and from there I went to El Paso, direct from Laredo.

Q. And your wife knew that you were not expected to be in until the 25th?

A. That's true.

Mr. TINSMAN. That's all.

Redirect examination by Mr. MCDONALD:

Q. You mean the 25th of May?

A. 25th of May, sir.

Q. What occasioned your return?

A. Beg your pardon?

53 Q. How come you returned to San Antonio?

A. I was contacted by the officers of the Court. They told me to come in, sir; either come in, or they'd send and get me.

Q. And you were contacted by telephone, weren't you?

A. Yes, I was contacted in Big Spring, Texas, by telephone, sir.

Q. All right, sir.

Mr. MCDONALD. No further questions.

Recross examination by Mr. TINSMAN:

Q. How long had you been in Big Spring when you were contacted?

A. I had arrived in Big Spring Saturday morning about 10:00 o'clock, sir, from El Paso.

Q. So you were in Big Spring from Saturday until Wednesday; is that correct?

A. Well, I was in Big Spring, Odessa, and Snyder. Now, Odessa is about 60 miles from Big Spring, and Snyder is 48 miles from Big Spring.

Q. What days were you in Big Spring, though, is my question, sir?

A. Saturday. Saturday morning I arrived at Big Spring from El Paso.

Q. And how long did you—in other words, is that the only time you were in Big Spring, or what other days were you in Big Spring?

A. I was in Big Spring Saturday, Sunday and Monday.

Q. And then you were back in Big Spring on Wednesday?

A. Wednesday. I left Big Spring Wednesday, yes, sir.

54 Q. In other words, that's when the Government contacted you?

A. That's true.

Mr. TINSMAN. That's all.

Mr. MCDONALD. No further questions, Your Honor.

* * * * *

171 (The Clerk reads the verdict of the jury.)

The COURT. Ladies and gentlemen, your verdict will be received and filed with the Clerk, and you will be discharged from this particular case and excused until 9:00 o'clock next Monday morning.

(Thereupon the jury retired.)

Colloquy between Court and counsel

The COURT. Mr. Tinsman, is the defendant on bond?

Mr. TINSMAN. No, sir.

The COURT. Well, I'll set the sentence for 2:00 o'clock Monday afternoon, provided I get a report. All right, Mr. Tinsman; it will be 2:00 o'clock Monday afternoon.

172 Mr. TINSMAN. May I make my bill at this time?

The COURT. Yes, sir, if you can get through by 5:00 o'clock, you can.

Mr. TINSMAN. Yes, sir, I think I can.

I think it is shown in the record that the jury that tried and convicted Raymond Downum just now was a different jury than the first jury that was empaneled and sworn.

The COURT. At least, in part, it was, I think.

Mr. TINSMAN. Sir?

The COURT. I say it was in part, anyway. You checked that list. You ought to know.

Mr. TINSMAN. There may be one or two on the same list, but the majority of the people were not on the first jury, and the first jury was discharged. I think that's——

The COURT. There is no question about that.

Mr. TINSMAN. All right, sir. I'd like to ask Mr. McDonald if prior to the time that he empaneled the first jury if he ascer-

tained whether Mr. Rutledge had been served with a subpoena, if he attempted to ascertain this from the Marshal's office.

Mr. McDONALD. Your Honor, I attempted to determine that. I believe, the day prior to the setting of this case, and I was informed that they had contacted the witness's wife, and that she was going to inform them of his whereabouts, and the Court is well familiar with the 12 cases that were

173 set for call all at one time, I believe. I'd like the record to reflect this, that 12 cases were set for call, and the United States Attorney's office was notified of that, I believe, on Wednesday, or possibly Thursday——

The COURT. You mean before they were to be called on Monday?

Mr. McDONALD. That's right, Your Honor. In the 12 cases there were approximately a hundred witnesses to be called; that is an estimate on my part. And the subpoenas were gotten out, all of the subpoenas on the witnesses were gotten out, given to the Marshal, and with the large number of supoenas that we had out, and also trying some cases, I found it impossible to ascertain if every witness was here at a particular time; and I did check with the Marshal, I think, the day before, and received the information that the wife was going to let me know where her husband was, if she could find out, and due to the pressing of business, I was unable to check immediately at the time of trial.

I would state further for the purpose of the record that this defendant was never arraigned in the presence of the jury. I believe the record will reflect that.

The COURT. I think you are both agreed on that.

Mr. TINSMAN. That's right. He was arraigned in the presence of the Court some date prior to the selection of the jury.

The COURT. That's true.

174 Mr. TINSMAN. So, then, from what you said, Mr. McDonald, I think it is correct then you did not, regardless of what the reasons were, you did not check with the United States Marshal's office very shortly prior to picking the Jury Number 1 in this case, to ascertain whether the subpoena was served on Mr. Rutledge; is that correct?

Mr. McDONALD. I stated I checked the day before.

Mr. TINSMAN. I mean immediately prior.

Mr. MCDONALD. No, I checked the day before.

Mr. TINSMAN. There was nothing that prevented you from—you or having someone else in your office check with the United States Marshal's office, which is located directly across the hall from your office, if you had so desired, is there?

Mr. MCDONALD. Yes, I was in another case that morning of that day.

Mr. TINSMAN. There are other attorneys in the office and other people that could have checked if you had asked them, aren't there?

Mr. MCDONALD. They were all tied up and all busy. We had 12 cases set.

The COURT. The Court knows that to be a fact, gentlemen, and I think you know it to be a fact that I set these cases on those gentlemen on very short notice, and every one of them was head over heels in work.

Mr. TINSMAN. Your Honor, I realize that, and I
175 think if the District Attorney had requested, which he did not do, five minute recess, so he could go check with the Marshal's office before picking a jury to ascertain whether all of his witnesses were here, or had been served——

The COURT. I am not talking about what you think. I am just talking about the facts.

Mr. TINSMAN. Isn't it true, Mr. McDonald, if someone had gone to the U.S. Marshal's office just five minutes before picking the jury, or even while it was being picked, that they could have ascertained that Mr. Rutledge's subpoena hadn't been served on him?

Mr. MCDONALD. I don't know what they would have ascertained at that time. I found out later that it had not.

Mr. TINSMAN. It obviously wouldn't have while the jury was being picked. At the time that the continuance was asked for, just prior to 2:00 o'clock, after picking the first jury, on Tuesday afternoon, April 25th, you had sufficient evidence to convict Raymond Downum as to Counts 3, 4, 5, and 8, in your opinion, did you not?

Mr. MCDONALD. At that time it was my opinion that this was a necessary witness.

Mr. TINSMAN. You didn't answer my question, sir. In your opinion, did you have sufficient evidence to convict Raymond Downum as to Counts 3, 4, 5, and 8?

The COURT. You mean by that did he have witnesses
176 present?

Mr. TINSMAN. Witnesses present and ready to testify.

Mr. McDONALD. No, I did not have sufficient witnesses present to convict at that time on those counts.

Mr. TINSMAN. Didn't you announce to the Court, sir, the only witness that was absent, and the only reason you were asking for the continuance was because of the absence of Clarence Rutledge?

Mr. McDONALD. That's true.

Mr. TINSMAN. Is he the only witness that was absent?

Mr. McDONALD. That's right.

Mr. TINSMAN. Is he the only reason you asked——

Mr. McDONALD. That is right.

Mr. TINSMAN. And it is your testimony that without his testimony, you could not have convicted as to Counts 3, 4, 5, and 8?

Mr. McDONALD. That's right.

Mr. TINSMAN. Even though in the actual trial, he never testified as to any of those counts?

Mr. McDONALD. Yes, he did. He was the named payee under Count 3.

Mr. TINSMAN. No, "6" and "7", sir.

Mr. McDONALD. Let me check that. That's right; it is "6" and "7". Oh, you did not include the ones we con-
177 victed on?

Mr. TINSMAN. I asked could you convict on Counts 3, 4, 5, and 8? In your opinion did you have sufficient evidence, that if the jury believed your witnesses——

Mr. McDONALD. I possibly could.

The COURT. Talk out loud. You are talking to the Court, not yourselves. Raise your voices.

Mr. McDONALD. In my opinion at that time Mr. Rutledge was the named payee on a check in Counts 6 and 7 of the indictment, and I was a while ago thinking he was a named payee in "1," "2," and "3," but I was mistaken about that. It

was my opinion that under the entire indictment, we could not safely go to trial on this case without the attendance of this witness, since that check is the one that—a witness that cashed the check could positively identify the defendant as being the one that signed it in his store and cashed it.

Mr. TINSMAN. If you had checked with the Marshal's office and found the subpoena was unserved, and found Mr. Rutledge had not been here prior to picking the jury, would you have announced not ready at that time?

Mr. MCDONALD. I don't know what I would have done. I believe that I would have asked that the case be passed to some future date, or at least if I had known that, and had had that information, I think that I would have asked that we not go to trial.

178 The COURT. You mean you wouldn't have announced ready for trial?

Mr. MCDONALD. That's right.

Mr. TINSMAN. The only thing that prevented you from obtaining that information is the fact that you and your office were busy, and you considered other things of more importance than obtaining that information.

Mr. MCDONALD. No, I would say that I and all other members of our office were swamped, and we had something to do every second of the time.

Mr. TINSMAN. How many attorneys are in your office, sir?

Mr. MCDONALD. Actually, at that time, trying cases, two.

Mr. TINSMAN. I didn't ask you that. I asked you how many attorneys were in the office that you could have, if you had to,——

Mr. MCDONALD. Actually, the chief United States Attorney, Mr. Wine, Mr. Key Hoffman and myself were the only ones that were present that week.

Mr. TINSMAN. How about Mr. Luetheke?

Mr. MCDONALD. He was not there. He was on leave at that time for attendance in connection with military service.

Mr. TINSMAN. And, in addition, in your office how many secretaries do you have in the San Antonio office?

179 Mr. MCDONALD. I believe there are five. Of course, about three of those do nothing but maintain the rec-

ords. This is the main office for the United States Attorney for the entire Western District of Texas, and about three of them are constantly engaged in the maintaining of records for the Western District.

Mr. TINSMAN. It is true that at least one secretary helps in the courtroom at times; is that correct?

Mr. MCDONALD. At times.

Mr. TINSMAN. I think we brought this out, that the U.S. Marshal's office is directly across the hall from your office.

Mr. MCDONALD. That's a fact.

Mr. TINSMAN. And you knew on Monday that there was some possibility that Mr. Rutledge might not be here, didn't you?

Mr. MCDONALD. Only a very meager possibility. I assumed, since his residence was San Antonio, and they had contacted his wife, that without a doubt he would be located and would be served.

Mr. TINSMAN. But this was not exactly a completely unforeseeable circumstance?

Mr. MCDONALD. It was on my part at the time of the selection of this jury, yes.

Mr. TINSMAN. But the reason it was unforeseeable was because you didn't take the trouble to go and find out; isn't that correct?

180 Mr. MCDONALD. No, it is not. It is because I did not have the opportunity and the time to.

The COURT. Put that loudspeaker before you. You don't raise your voice. You keep it down.

Mr. TINSMAN. Did you make any request to the Court to attempt to find whether your witnesses were there?

Mr. MCDONALD. I believe the record will reflect that I did not. I will state this: This particular case is Number 10 on the list of settings, and I could not foresee that it would come up for trial on the second day of the settings.

Mr. TINSMAN. Well, it's true that you could foresee it just as well as defense counsel could foresee it, isn't it?

Mr. MCDONALD. I will ask you there, how many witnesses did you have to call, and how many cases did you have set over here?

Mr. TINSMAN. This was the only case that I had set besides a guilty plea.

Mr. MCDONALD. All right. I don't believe there is any comparison there.

Mr. TINSMAN. Isn't it true, Mr. McDonald, that by not checking, you took a chance that Mr. Rutledge might not be here, however slim you may have considered that chance?

Mr. MCDONALD. That is not a question that suggests
181 itself to answering. There was a possibility, or there is no doubt that it was a chance, but the question is whether it was a foreseeable contingency under the circumstances, and I think it was not.

Mr. TINSMAN. If someone had checked with the Marshal's office from your office, regardless of who that person might have been, prior to your picking the jury, or during the time you picked the jury, then it would have no longer been unforeseeable; isn't that correct?

Mr. MCDONALD. Actually, when you say "if," it is pretty hard to determine ahead of time what the circumstance is. If you just didn't have a chance to do it, and don't have time to do it, you couldn't check, but as it was proven out, the subpoena was not served, and we could have found out about it if we had had an opportunity and time to check it, along with about ninety-some-odd others.

Mr. TINSMAN. I think that's all, Your Honor.

The COURT. All right. Now, to preserve your record I would suggest you file your motion for judgment for the reasons that you are contending. I won't——

Mr. TINSMAN. Well, if the Court please, I am going to file a motion for acquittal, which will, as the Court stated, be taken as presented before the second trial, on the ground that the defendant has been placed in double jeopardy. I filed an oral motion——

The COURT. I didn't say before the second trial. It can be filed as of before the beginning of this trial.

182 Mr. TINSMAN. Well, this is the second trial.

The COURT. I don't think so. I'm not agreeing with you on that.

Mr. TINSMAN. All right, sir. But you are agreeing that I may file as of before this trial was——

The COURT. Before this jury was selected; it can be filed as of that date. What I am trying to suggest is that you don't overlook the fact that you're going to have to file a motion for new trial or something to keep this time from creeping up on you.

Mr. TINSMAN. Yes, sir.

The COURT. It may be that you'll have to file a motion for new trial in skeleton form and ask leave to amend it later; I don't know.

Motion for new trial

Mr. TINSMAN. All right, sir. To protect my rights, then, at this time I will file a motion for new trial.

The COURT. All right.

* * * * *

183 *Transcript of sentencing proceedings*

Be it further remembered that on the 1st day of May, 1961, at 2:00 p.m., in the San Antonio Division of the United States District Court, Western District of Texas, before the H n. Ben H. Rice, Jr., Judge of said court, the above named defendant was called for sentencing, whereupon the following proceedings were had:

Appearances: Mr. K. Key Hoffman, Jr., Assistant United States Attorney, San Antonio, Texas, appearing on behalf of the Government; Mr. Richard E. Tinsman, San Antonio, Texas, appearing on behalf of the Defendant.

SAN ANTONIO, TEXAS, MONDAY, MAY 1, 1961

AFTERNOON SESSION

Mr. HOFFMAN. We will call next for sentencing Raymond Downum.

The COURT. Counsel, anything you wish to say now on behalf of your client?

Mr. TINSMAN. Yes, sir.

The COURT. All right, sir.

Mr. TINSMAN. I'd like to renew the plea of former
184 jeopardy that we previously filed here, Your Honor, at this time.

The COURT. All right. I've already overruled the plea.

Mr. TINSMAN. Yes, sir. I'd like to give the Court a chance to reconsider that.

The COURT. Well, I'll reconsider it later. I'll go ahead and sentence him now.

Mr. TINSMAN. All right, sir. There is nothing else I have to say.

The COURT. Mr. Downum, anything you wish to say in your own behalf before I pass sentence in your case?

The DEFENDANT. No, sir.

The COURT. You have a record here of arrests, November 18, '55, to date, consisting of arrests for theft, vagrancy, investigation for forgery, and swindling under $50; no disposition. Now, November 14th, 1958, in Bexar County, you were sentenced by the state court to serve two years in Texas penitentiary for forgery, and you were released without supervision on April 18, 1960. Is that correct?

The DEFENDANT. Yes, sir.

The COURT. On Counts 3, 4, 5, 6, and 7, you were convicted on those counts, I am going to sentence you to serve eight years on all of those counts generally. And on Count
185 8 that you were convicted of, I'm going to sentence you to serve five years, to run concurrently with the sentence imposed under Counts 3, 4, 5, 6, and 7. That's all.

187 In the United States District Court For the Western District of Texas, at San Antonio Division

Number 22115 Criminal

Verdict of the Jury in the Case of

UNITED STATES OF AMERICA

vs.

RAYMOND DOWNUM

Filed April 28, 1961

We, the jury, find the defendant Raymond Downum guilty as charged in the third count of the indictment; guilty as charged in the fourth count; guilty as charged in the fifth count; guilty as charged in the sixth count; guilty as charged in the seventh count; and guilty as charged in the eighth count thereof.

G. P. PARISH,
Foreman.

189 In United States District Court, Western District of Texas, San Antonio Division

[Title omitted.]

Renewal of plea of former jeopardy

Filed April 28, 1961

Now comes Raymond Downum prior to sentence being imposed after his conviction on all six counts of the indictment by the second jury impaneled and sworn herein, which jury was from a different panel from the first jury which was sworn in in his case, and had different members on it than the first jury in this case, and renews his plea of former jeopardy made prior to impaneling the second jury in this case, and asks the court to take into consideration the remarks of Mr. McDonald, U.S. Prosecutor, in this case adduced in open court after the jury had returned its verdict of guilty on all six counts, would show to the court that Mr. McDonald's statements clearly show that there was no "unforeseen circumstances" requiring the discharge of the first jury which was duly impaneled and sworn to try Raymond Downum, and further says it would be an

abuse of this court's discretion to fail to grant the Plea of Former Jeopardy of Raymond Downum.

GROCE & HEBDON,
By RICHARD TINSMAN,
Attorneys for defendant.
911 Frost Bank Building, San Antonio, Texas.

191 In United States District Court, Western District of Texas, San Antonio Division

No. 22115 Criminal

UNITED STATES OF AMERICA

vs.

JUAN R. CAMPOS, RAYMOND DOWNUM, RONNIE HECK, AND RAYMOND HECK

Judgment and sentence

On the 27th day of April, 1961, this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, Raymond Downum, in his own proper person and by counsel, and thereupon a jury, to-wit: George R. Parish and eleven others, was duly selected, empaneled and sworn, after both parties announced ready for trial. And on the 28th day of April, 1961, said defendant was arraigned at the bar of the court, and in open court, pleaded not guilty to the charges contained in the third, fourth, fifth, sixth, seventh and eighth counts of the indictment herein. And said jury having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of their verdict, and afterwards were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is now here entered upon the minutes of the court, to-wit:

"Verdict of the Jury in the Case of *United States of America* vs. *Raymond Downum*, Number 22115 Criminal

> We, the jury, find the defendant Raymond Downum, guilty as charged in the third count of the indictment; guilty as charged in the fourth count; guilty as charged in the fifth count; guilty as charged in the sixth count; guilty as charged in the seventh count; and guilty as charged in the eighth count thereof.
>
> G. R. PARISH,
> *Foreman.*"

Wherefore, it was considered and adjudged by the Court that the defendant, Raymond Downum, is guilty, as found by the jury, of the offense of having, on or about December 3, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, acting jointly and severally with others, with intent to defraud the United States, knowingly and wilfully uttered as true a check described as follows:

> "Check No. 15,676,363 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Dolores M. Cameron, in the sum of $56.30."

then knowing the endorsement thereon to be forged, as charged in the third count of the indictment; and

of the offense of having, on or about December 6, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Jayme J. Maltsberger, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $58.00, which said check is described as follows:

> Check No. 15,443,535 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Jayme J. Maltsberger, in the sum of $58.00.

as charged in the fourth count; and

192 of the offense of having, on or about the time and place and within the jurisdiction, all as set out in the fourth count of the indictment, acting jointly and severally with

others, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the fourth count of the indictment, then knowing the endorsement thereon to be forged, as charged in the fifth count; and

of the offense of having, on or about December 1, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Clarence D. Rutledge, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit $19.00, which said check is described as follows:

> Check No. 1,624,541 drawn on the Treasurer of the United States, dated November 30, 1960, issued at Dallas, Texas, over Symbol No. 3110, payable to the order of Clarence D. Rutledge, in the sum of $19.00.

as charged in the sixth count; and

of the offense of having, on or about the time and place and within the jurisdiction, all as set out in the sixth count of the indictment, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the sixth count of the indictment, then knowing the endorsement there on to be forged, as charged in the seventh count; and

of the offense of having, on or about the time and place and continuing to and through December 28, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, acting jointly and severally with others, unlawfully, knowingly and wilfully combined, conspired, confederated and agreed to commit offenses against the United States of America, the exact date of the formation of the conspiracy and its termination being unknown, to-wit, to knowingly and unlawfully steal from a house letter box a letter and to remove from such letter a check drawn on the Treasurer of the United States; to knowingly and fraudulently make and forge the name of the payee upon the back of a U.S. Treasury Check for the purpose of obtaining and receiving from the United States a certain sum of money; and to knowingly and wilfully utter as true the check described knowing the endorse-

ment thereon to be forged, and pursuant to said conspiracy, and to effect the objects thereof, committed one or more of the overt acts charged in the eighth count of the indictment, as charged in the eighth count thereof.

Thereupon sentence was temporarily deferred.

Now, on this the 1st day of May, 1961, said defendant coming into open court for the purpose of sentence and being asked by the Court if he had anything to say why the sentence of the law should not be pronounced against him, and he answering nothing in bar thereof:

It is the order and sentence of the Court that the defendant, Raymond Downum, for the said offenses by him committed and charged in the third, fourth, fifth, sixth and seventh counts of the indictment, be imprisoned for the period of eight (8) years in an institution to be designated by the Attorney General of the United States, and for the said offense by him committed and charged in the eighth count of the indictment, be imprisoned for the period of five (5) years in an institution to be designated by the Attorney General of the United States, said sentence of the imprisonment imposed under said eighth count to run concurrently with the sentences of imprisonment imposed under the third, fourth, fifth, sixth and seventh counts of the indictment, and that said defendant be, and he is hereby committed to the custody of said Attorney General or his authorized representative.

193 The Clerk will provide the United States Marshal with a certified copy of the Judgment and Sentence.

Ordered in open court at San Antonio, Texas, this the 1st day of May, 1961.

BEN H. RICE, Jr.,
United States District Judge.

Approved:

RUSSELL B. WINE,
United States Attorney.

By ——— ———
Assistant U.S. Attorney.

Entered: Minute Volume C-2 page 226.

201 In United States District Court, Western District of Texas, San Antonio Division

[Title omitted.]

Order denying plea of former jeopardy

May 24, 1961

On the 22nd day of May, 1961, came on to be heard Plea of Former Jeopardy filed herein by the Defendant, Raymond Downum, and the Court after hearing argument of counsel is of the opinion that the plea should be overruled.

It is therefore ordered that the Plea of Former Jeopardy filed herein by the Defendant, Raymond Downum, be, and the same is hereby, denied.

Entered at San Antonio, Texas, this 24th day of May, 1961.

BEN H. RICE, Jr.,
United States District Judge.

216 In United States District Court, Western District of Texas, San Antonio Division

[Title omitted.]

Transcript of proceedings of April 19, 1961

Be it remembered that on the 19th day of April, 1961, in the San Antonio Division of the United States District Court, Western District of Texas, before the Hon. Ben H. Rice, Jr., Judge of said court, the above named defendants were called for arraignment, whereupon the following proceedings were had:

Appearances: Mr. John W. McDonald, Assistant United States Attorney, Waco, Texas, appearing on behalf of the Government; Mr. Richard E. Tinsman, San Antonio, Texas, appearing on behalf of Raymond Downum; Mr. Otis A. West, San Antonio, Texas, appearing on behalf of Juan R. Campos; Mr. Lloyd L. Oubre, San Antonio, Texas, appearing on behalf of Ronnie Heck.

217 *Proceedings on arraignment*

SAN ANTONIO, TEXAS

WEDNESDAY, APRIL 19, 1961, 2:00 P.M.

Mr. McDONALD. May it please the Court, we'd like to call Number 22115, Juan R. Campos, Raymond Downum, and Ronnie Heck.

The COURT. Who is this lady; what is she doing up here?

Mrs. PEARL A. MASON. Mr. West has gone to court; I wasn't able to locate him.

The COURT. Speak out loud; I can't understand you.

Mrs. MASON. Mr. West has gone to court.

The COURT. Mr. Who has gone to court?

Mrs. MASON. Otis West.

The COURT. Mr. West?

Mrs. MASON. Yes, sir, Mr. Otis West.

The COURT. Is he a lawyer here?

Mrs. MASON. Yes, he is.

The COURT. Who does he represent?

Mrs. MASON. This defendant.

The COURT. When did you employ him?

Mrs. MASON. He came in just about 1:15, Your Honor, this afternoon, and I am in the office. I'm Pearl Mason.

The COURT. Are you an attorney?

Mrs. MASON. Yes, I am, Judge.

The COURT. Admitted to practice in this court?

218 Mrs. MASON. I was admitted in '27, in all the courts.

The COURT. Have you been admitted to practice in federal court?

Mrs. MASON. Many years ago.

The COURT. In this court?

Mrs. MASON. I think so. I was admitted in North Carolina in '27.

The COURT. In the federal court in North Carolina?

Mrs. MASON. Yes, sir, but I am only here for Mr. West, because I wasn't able to locate him.

The COURT. In other words, you were not employed?

Mrs. MASON. No, sir.

The COURT. You can't come up here representing a man who has not employed you. It will be up to Mr. West, if he accepted employment, to come down here. Mr. Marshal, will you tell Mr. West to come here immediately, please? We'll go ahead with the other two.

Mr. MCDONALD. Which one of you is Raymond Downum?

RAYMOND DOWNUM. I am.

Mr. MCDONALD. And you are Ronnie Heck?

RONNIE HECK. Yes.

Mr. MCDONALD. Now, Mr. Downum,——

(Mr. West comes forward.)

The COURT. Is this Mr. West?

Mr. WEST. Yes, sir.

219 The COURT. Why didn't you come forward a moment ago?

Mr. WEST. I didn't know about this case, Your Honor. This man came into my office this morning, I understand, and wanted to employ me, and he talked to one of the other attorneys in the office. And my secretary told me that he came up here with Mrs. Mason.

The COURT. Where were you when the case was called?

Mr. WEST. I was outside of the courtroom, Your Honor.

The COURT. Have you been admitted to practice before this court?

Mr. WEST. Yes, I have, Your Honor.

The COURT. All right.

Mr. MCDONALD. You are Juan R. Campos?

JUAN R. CAMPOS. Yes.

Mr. MCDONALD. And are you representing Mr. Campos, Mr. West?

Mr. WEST. I assume I am, sir. I haven't even talked to the man. He came in my office and said he's been referred to me by someone. This is the first time I've ever seen the gentleman.

The COURT. You're up here appearing for him, so you're his attorney.

Mr. WEST. Yes, sir; I'll represent him.

The COURT. How about the other two?

Mr. MCDONALD. Now, Mr. Campos, you are charged with the violation of the postal laws and theft of letters from

220 mail boxes and forging and cashing checks, Government checks, after they were taken from mail boxes. Now, you are charged in Count One with theft, Counts Three and Five with passing the checks, one in the amount of $56.30 made payable to Delores M. Cameron, and another one in the amount of $19 made payable to Clarence D. Rutledge. And under Count Eight, you are charged with conspiring and planning to steal these checks and cash them. You all three are charged with that. Now, the maximum punishment that may be given upon a plea of guilty or being found guilty under Count One is $2,000 fine or five years in prison or both; under Counts Three and Five, the maximum punishment that may be assessed is $1,000 fine or ten years in prison or both. And under Count Eight, a maximum fine of $10,000 or five years in prison or both.

And, Mr. Downum, you are charged under Counts Three, Four, Five, Six, Seven, and Eight. The maximum punishment that may be assessed under those counts, under Three, Four, Five, Six, and Seven is $1,000 fine or ten years in prison or both. Under Count Eight, $10,000 fine or five years in prison or both.

Now, Ronnie Heck, you are charged——

The COURT. What are those counts he's accused of, the offenses?

Mr. MCDONALD. Your Honor, Count Three is the uttering of a check and the passing of a check knowing it was

221 forged; Count Four is the forgery of a check in the amount—made payable to Jayne J. Maltsberger, in the sum of $58; and Count Five is the passing of that same check; and Count Six is the forgery of a check in the amount of $19, made payable to Clarence D. Rutledge; and Count Seven is the passing of that check. Count Eight is a conspiracy count alleging that they entered into a conspiracy to steal and cash these checks.

The COURT. You mean all three of the defendants?

Mr. MCDONALD. That's right, sir. Now, the maximum punishment under Count Number Eight is $10,000 or five years in prison or both.

Ronnie Heck, you are charged under Counts One, Two, Three and Eight.

The COURT. Five, too, I think.

Mr. MCDONALD. Two, Three, Five and Eight. Now, Count Number Two is the forgery of a check in the amount of $56.30, made payable to Delores M. Cameron; Count Number One is the theft of a check contained in a letter addressed to Delores M. Cameron; and Count Two is the forgery, and Count Three is the passing of that check. Count Five is the passing of the check made payable to Jayne Maltsberger in the amount of $58. Count Eight charges that you conspired to steal these checks and letters and pass them.

Now, under Count One, the maximum punishment
222 that may be assessed upon a plea of guilty or being found guilty is $2,000 fine or five years imprisonment; under Counts Two, Three and Five, the maximum punishment that may be assessed is $1,000 or ten years in prison or both on each of the Counts, and under Count Eight the maximum punishment that may be assessed is $10,000 fine or five years in prison or both.

Now, first, Raymond Downum, do you have an attorney?

Mr. DOWNUM. No, sir.

Mr. MCDONALD. Ronnie Heck, do you have an attorney?

Mr. HECK. No, sir.

Mr. MCDONALD. You are both advised that you have the right to have an attorney to represent you throughout all stages of these proceedings, and if you do not have funds or property with which to employ a lawyer, that the Court will appoint one for you without charge. Now, do you have any funds or property with which to employ a lawyer?

Mr. DOWNUM. No.

Mr. HECK. No, sir.

Mr. MCDONALD. Neither of you have any funds. How old are you?

Mr. HECK. 20.

Mr. MCDONALD. Now, Downum, how old are you?

Mr. DOWNUM. 21.

223 Mr. MCDONALD. And do either one of you want an attorney to represent you?

Mr. DOWNUM. Yes, sir.

Mr. HECK. Yes, sir.

The COURT. All right. Mr. Tinsman, will you represent the defendant Downum. And Mr. Oubre, will you represent the defendant Heck.

Mr. MCDONALD. May the record reflect all the attorneys have been furnished copies of the indictment. May we pass this and come back to it after the attorneys have——

The COURT. Yes; you may go outside and consult with your clients.

(Thereupon the defendants retired from the courtroom with their attorneys, and the Court proceeded with other matters. Thereupon this case was called again.)

Mr. MCDONALD. We'd like to recall Number 22115, Juan R. Campos, Raymond Downum, and Ronnie Heck.

The COURT. Have each of you gentlemen explained to your clients the maximum sentence that can be imposed on each of them under each of the counts of the indictment in the event they are convicted or plead guilty?

Mr. TINSMAN. Yes, sir.

The COURT. Do you understand the maximum punishment, Mr. Downum?

Mr. DOWNUM. Yes, sir.

The COURT. Do you understand?

Mr. HECK. Yes, sir.

224 The COURT. Do you understand?

Mr. CAMPOS. Yes.

Mr. MCDONALD. Count One concerns Juan R. Campos and Ronnie Heck.

(Thereupon Mr. McDonald read the first count of the indictment to the defendants.)

Mr. MCDONALD. To Count One of the indictment, Juan R. Campos, how do you plead?

Mr. CAMPOS. Guilty.

Mr. MCDONALD. Ronnie Heck, to Count One of the indictment how do you plead?

Mr. HECK. Guilty.

Mr. MCDONALD. Now, this Count Two concerns Ronnie Heck only.

(Thereupon Mr. McDonald read Count Two of the indictment to the defendants.)

Mr. McDONALD. To Count Two of the indictment, Ronnie Heck, how do you plead?

Mr. HECK. Guilty.

Mr. McDONALD. Count Three. This count concerns Ronnie Heck, Raymond Downum, Juan R. Campos, and Raymond Heck.

(Thereupon Mr. McDonald read the third count of the indictment to the defendants.)

Mr. McDONALD. Ronnie Heck, to Count Three of the indictment, how do you plead?

225 Mr. HECK. Guilty.

Mr. McDONALD. Juan R. Campos, to Count Three of the indictment, how do you plead?

Mr. CAMPOS. Guilty.

Mr. McDONALD. And Raymond Downum, to Count Three of the indictment, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Four, and this applies only to Raymond Downum.

(Thereupon Mr. McDonald read the fourth count of the indictment to the defendants.)

Mr. McDONALD. To Count Four of the indictment, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Five pertains to Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck.

(Thereupon Mr. McDonald read the fifth count of the indictment to the defendants.)

Mr. McDONALD. Juan R. Campos, to Count Five of the indictment, how do you plead?

Mr. CAMPOS. Guilty.

Mr. McDONALD. Raymond Downum, to Count Five of the indictment, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. And Ronnie Heck, to Count Five of the indictment, how do you plead?

Mr. HECK. Guilty.

226 Mr. McDONALD. Count Six. This applies to Raymond Downum alone.

(Thereupon Mr. McDonald read the sixth count of the indictment to the defendants.)

Mr. McDONALD. To Count Six of the indictment, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Seven. This applies to Raymond Downum alone.

(Thereupon Mr. McDonald read the seven count of the indictment to the defendants.)

Mr. McDONALD. To Count Seven, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Eight. This applies to all four parties.

(Thereupon Mr. McDonald read the eighth count of the indictment to the defendants.)

Mr. McDONALD. To the eighth count of the indictment, Juan R. Campos, how do you plead?

Mr. CAMPOS. Guilty.

Mr. McDONALD. To the eighth count of the indictment, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. To the eighth count of the indictment, Ronnie Heck, how do you plead?

227 Mr. HECK. Guilty.

The COURT. Now, Campos, to those counts of the indictment to which you've pled guilty, did you enter your plea of guilty solely because you are guilty?

Mr. CAMPOS. Yes, sir.

The COURT. Not because of any persuasion or promises made to you?

Mr. CAMPOS. No, sir.

The COURT. Not because of any fear or threats made against you?

Mr. CAMPOS. No.

The COURT. Downum, as to those counts to which you've entered a plea of guilty——

Mr. DOWNUM. I have not entered a plea of guilty.

The COURT. You have not entered a plea of guilty?

Mr. TINSMAN. No, sir.

Mr. MCDONALD. He pled not guilty to all counts on which he was charged.

The COURT. I thought on Count Three he pled guilty.

Mr. TINSMAN. No, sir. Not guilty as to all counts.

* * * * *

231 In the United States Court of Appeals for the Fifth Circuit

No. 19033

Argument and Submission—November 22, 1961.

RAYMOND DUWNUM

v.

UNITED STATES OF AMERICA

On this day this cause was called, and after argument by Richard Tinsman, Esquire, for Appellant, and John W. McDonald, Esquire, Assistant United States Attorney, for Appellee, was submitted to the Court.

232 [File endorsement omitted.]

In the United States Court of Appeals for the Fifth Circuit

No. 19033

RAYMOND DOWNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Texas

Opinion of the Court - March 9, 1962

Before JONES, BROWN and GEWIN, Circuit Judges.

BROWN, Circuit Judge: This appeal brings into consideration the effect of the double jeopardy provision of the Fifth

Amendment of the Constitution.[1] Our view of the circumstances of this case is that this constitutional guarantee has not been infringed by Downum's trial and conviction. We therefore affirm.

233 The facts are simple and undisputed. The problem concerns their legal significance. On April 19, 1961, Downum was arraigned in open court on an indictment of six counts relating to stealing, forging, and passing Government checks, and conspiracy to commit those acts, 18 USCA §§ 1708, 495 and 371. Downum entered a plea of not guilty on all counts while his codefendants pleaded guilty. This was done prior to the selection or impaneling of the jury.

On April 25, 1961, the case was called for trial. Both sides announced ready and a jury was selected and sworn in the morning. The jury was directed to return in the afternoon after being instructed not to discuss any phase of the case. At 2:00 o'clock that afternoon, the Judge announced from the bench that he had been advised by the prosecutor that since a material witness was not present, the trial could not proceed.[2] Despite objection by Downum, the jury was then called into the courtroom and discharged.

On April 27, 1961, two days later, and over Downum's plea of former jeopardy, a new jury was selected. Downum, convicted on all six counts, was sentenced to eight years on five counts to run concurrently, and five years on the sixth count to run concurrently with the other counts.

Downum now vigorously presses the single point of error that his conviction by the second jury was illegal because
234 he was placed in jeopardy when the first jury was

[1] "* * *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" U.S. Const. Amend. V.

[2] The absent witness was to give evidence on two counts of the six-count indictment. The reason for his absence was that he had not been subpoenaed as he had been out of town. This was brought to the prosecutor's attention after the jury had been selected. Downum objected to any postponement or discharge of the jury and moved that the trial proceed on the remaining four counts. But this was overruled. His motion to dismiss those two counts for lack of prosecution was likewise overruled.

impaneled and sworn, and there was not sufficient cause for its discharge.[3]

The Government takes the position that the action of the trial Judge was well within his judicial discretion in the interest of public justice. Further, the impaneling of the first jury did not actually commence the trial in any real sense—at least not to such an extent as to place the defendant in jeopardy. The Government advances other reasons. The defendant was not put to additional expense, or embarrassment. He was not kept in a continued and prolonged state of anxiety. Nor has he shown himself to have been prejudiced in any way, especially since he has not even claimed that the first jury was any more, or less, favorable than the second jury.

The problem may be illumined, but it is not answered by extremes. Clearly if the jury had not been impaneled, there could be no question of former jeopardy. Just as clearly, if substantial vital evidence had been presented to the first jury, there could have been no second trial in the absence of strong and compelling circumstances. Here, the case is somewhere in between: there was a jury impaneled, but there was no evidence offered or heard.

The guiding principles were announced almost a cen-
235 tury and a half ago in *United States* v. *Perez*, 1824, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165. There the jury was unable to agree and the Court discharged the jury and declared a mistrial. In response to certified questions, the Court held that a Judge may discharge a jury within sound discretion without operating as an acquittal when the ends of public justice require it.

A rigid, inflexible rule of law would not work in situations of this kind. All circumstances must be weighed on the delicate scales of justice. Courts are obliged to see that the scales do not become loaded on either side. On the one side, individuals must be protected from oppressive and fundamentally unfair governmental actions. On the other side, is the mani-

[3] Downum's brief phrases it this way:

"The Trial Court erred in trying defendant before a second jury two days after a prior jury had been selected, sworn in and then discharged because the prosecutor announced not ready, and thereby defendant had been placed in jeopardy once the first jury was sworn in. The absence of a witness as to 2 counts of a 6-count indictment was not an 'unforeseeable circumstance' causing the discharge of the first jury."

fest public interest in the protection of society by effectuating the policies of the penal laws.

Achieving this balance, it is our conclusion that, whatever may be the reaches or impact of this Amendment in other situations shading off of the precise one here, the fundamental purpose of this guarantee is not lost or diminished here by permitting a trial before a new jury after discharge of the first one. The circumstances do not here tip the scales in favor of the accused. Downum was never formally arraigned in the presence of the first jury. No evidence was presented for or against him.[4] Downum was never put to his defense.
236 What, and all there had been, was the impaneling of the first jury and its discharge for reasons entirely unrelated to the jury or the composition of it.

Of course, there has to be some sound reason for the termination of the current trial proceedings which will invariably result in the discharge of one jury with the expectation that another one will be chosen at the subsequent proceeding. *Gori* v. *United States*, 1961, — U.S. —, 81 S. Ct. —, 6 L. Ed. 2d 901. What actually occurred will therefore be of great importance.[5] The reason here was real and substantial. A vital witness was not, and would not be, available for the trial. The protection of double jeopardy is tested against the action taken by the Court. Consequently, it is of secondary importance only to inquire into whether the action or inaction of the prosecutor in not earlier subpoenaing the witness was, or was not, justifiable or excusable. Of course, conduct of the prosecutor may be of great importance where circumstances indicate that events of this kind are being advanced and exploited as pretexts to

[4] *United States* v. *Kraut*, S.D.N.Y., 1932, 2 F. Supp. 16, 18–19, implies that introduction of some evidence is required: "It is now well established by a preponderance of judicial opinion, that a defendant in a criminal action is put in jeopardy when he has been arraigned and placed on trial on a valid information or indictment and before a court of competent jurisdiction. Of course, being put on trial involves the impaneling of the jury and the production of some evidence."

[5] Of the constitutional guarantee against double jeopardy, *Murphy* v. *United States*, 7 Cir., 1923, 285 Fed. 801, 817, puts it this way. "Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue."

squeeze out of a trial then going badly for the Government in the hopes that the deficiencies can be overcome in a later trial.

But here there was no such evidence, nor is there any indication that Downum has been deprived of any right of any kind or that he has been prejudiced in any way."

237 This great constitutional bulwark stands against such conduct by the sovereign, State or Federal.[1] But only on rare occasions will the answer be found by looking at the particular stage to which the trial proceedings have transpired as though matters of such fundamental yet profound importance may be measured solely by matching case against case or trial element against trial element. Hence we reject the vigorous insistence that *Cornero* v. *United States*, 9 Cir., 1931, 48 F. 2d 69, compels a reversal. Intrinsically there are likely distinctions. There the subpoena had never been issued, while here there had been no service of the issued subpoena for reasons which the Court thought justifiable. Also, the delay in *Cornero* was two years, while here it was merely two days. But we do not stress these or other possible distinctions for the Supreme Court, just as are we, was "urged to apply the Cornero interpretation of the 'urgent necessity' rule * * *." It was, as are we, "* * * asked to adopt the Cornero rule under which * * * the absence of witnesses can never justify discon-

238 tinuance of a trial." In rejecting these contentions the Court spoke authoritatively for us as well:

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[1] See *Lovato* v. *New Mexico*, 1916, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244. See also *Collins* v. *Loisel*, 1923, 262 U.S. 426, 429, 43 S. Ct. 618, 67 L. Ed. 1062, where it was said, "The Constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. * * * Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground there was not sufficient evidence to hold the accused, was held, in *Bassino* v. *Cadu*, 208 U.S. 386, 391, 28 S. Ct. 392, 52 L. Ed. 540, 13 Ann. Cas. 905, not to constitute jeopardy."

[1] In the context of Fourteenth Amendment due process, see concurring opinion of Mr. Justice Frankfurter in *Brock* v. *North Carolina*, 1953, 344 U.S. 424, 429, 73 S. Ct. 349, 97 L. Ed. 456.

"A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

"Such a rigid formula is inconsistent with the guiding principles of the Perez decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Wade* v. *Hunter*, 1948, 336 U.S. 684, 691, 69 S. Ct. 834, 93 L. Ed. 974.

This Court, though not dealing with the exact problem here, had earlier stated the matter in terms of just such substantial underlying considerations. "Various interpretations have been put on the word 'jeopardy,' some courts thinking the first jeopardy is complete on the swearing of a jury, or on the submission of evidence. This is no doubt correct if the trial be stopped for insufficient cause. In other cases it is said that the meaning is that when there has been one real trial there shall not be another, but if a verdict is prevented by something serious, a mistrial can be declared and a new trial ordered without the consent of the accused." *Sanford* v. *Robbins*, 5 Cir., 1940, 115 F. 2d 435, 438.

In the light of these principles the District Court did not abuse its sound discretion in discharging the first jury.
239 *United States* v. *Potash*, 2 Cir., 1941, 118 F. 2d 54, cert. denied, 313 U.S. 584, 61 S. Ct. 1163, 85 L. Ed. 1540.

Affirmed.

240 In United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19,033

D. C. Docket No. 22115 Criminal

RAYMOND DOWNUM, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Texas

Before JONES, BROWN and GEWIN, Circuit Judges.

Judgment

March 9, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued: March 9, 1962.

241 [Clerk's certificate omitted in printing.]

242 Supreme Court of the United States

No. 44 Misc, October Term, 1962

RAYMOND DOWNUM, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Order granting motion for leave to proceed in forma pauperis and granting petition for unit of certiorari

October 8, 1962

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 489 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 8, 1962

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

U.S. GOVERNMENT PRINTING OFFICE 1962